Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-122

In The
Supreme Court of the United States
October Term, 1986

IN RE THE MARRIAGE OF THOMPSON

ROBERT M. THOMPSON,

Appellant,

v.

JOAN E. THOMPSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

OPPOSITION TO MOTION OF APPELLEE JOAN M. THOMPSON TO DISMISS

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Appellant ROBERT M. THOMPSON files the following opposition to motion of Appellee JOAN E. THOMPSON to dismiss the within appeal on the grounds that the Federal question sought to be reviewed was not timely and properly raised in the Court below.

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STATEMENT OF FACTS

Appellee's motion to reallocate Appellant's military retirement benefits was heard, argued, briefed and the trial court took it under submission on April 20, 1983. On May 27, 1983 the trial court granted Appellee's motion to reallocate Appellant's military retirement benefits. Appellant timely filed his notice of appeal to the California Court of Appeal on July 25, 1983. California Civil Code Section 5124 did not become law until January 1, 1984. For this very obvious reason the applicability of California Civil Code Section 5124 and the ancillary issues, i.e., whether such Code Section violated the contract clause, Article 1, Section 10 of the United States Constitution and whether the Code Section as application to this particular case violated the due process clause of the Fifth Amendment to the United States Constitution were not raised in the trial court. Because these issues were not raised in the trial court they were not argued in Appellant's opening brief. These issues were first raised in Respondent's opening brief in the California Court of Appeal where for the first time Appellee argued that California Civil Code Section 5124 was dispositive of the issues raised in the trial court. These issues were addressed in response by Appellant in his closing brief filed with the California

Court of Appeal on July 19, 1985. These issues were further argued at length before the California Court of Appeal in oral argument. The California Court of Appeal in its decision selectively discussed only the due process issue without addressing the impairment of contract argument raised by Appellant. Appellant, in response to Respondent's opening brief in the California Court of Appeal raised the further issue that Civil Code Section 5124 was not applicable to this case in that California Civil Code Section 5124 did not become law until over seven months after the date of the trial court's decision herein. The California Court of Appeal explicitly recognized that absentee passage of California Civil Code Section 5124, the trial court was without authority to modify the judgment as it did. Thus, Appellee's argument that the question of the constitutionality of California Civil Code Section 5124 was not properly raised in the Court of Appeal is specious. The applicability of California Civil Code Section 5124 was never raised by Appellee at the trial court level and was raised for the first time on appeal by Appellee in the California Court of Appeal. In response to Appellee's assertion that California Civil Code Section 5124 was dispositive of the issues raised on appeal, Appellant argued that said code section was unconstitutional on the grounds stated in Appellant's appeal to this court. To categorize Appellant's raising of these issues as "eleventh hour arguments" as Appellee does in her motion to dismiss simply ignores the chronology of the effective dates of the applicable law herein. The California courts were not justified in simply ignoring Appellant's arguments.

CONCLUSION

The Court should deny the motion of Appellee to dismiss [or affirm] this appeal.

Respectfully submitted,

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